

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-5002

To Be Argued By:
Theodore Gewertz

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-5002
Bankruptcy No. 75 B 1735

In Re

W. T. GRANT COMPANY,

Bankrupt,

PAUL S. BERGER, Trustee, RONALD M. LEE and
SUTRO MORTGAGE INVESTMENT TRUST, individu-
ally and on behalf of all others similarly
situated,

Plaintiffs-Appellants,

-against-

CHARLES G. RODMAN, Trustee in Bankruptcy of
W. T. GRANT COMPANY, Bankrupt,

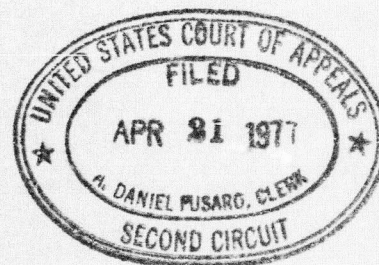
Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF OF DEFENDANT-APPELLEE

Theodore Gewertz
Of Counsel.

Wachtell, Lipton, Rosen & Katz
Attorneys for Defendant-Appellee,
Charles G. Rodman, Trustee of the
Estate of W.T. Grant Company,
Bankrupt
299 Park Avenue
New York, New York 10017
Tel. (212) 371-9200



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BRIEF OF DEFENDANT-RESPONDENT
CHARLES G. RODMAN, TRUSTEE OF
THE ESTATE OF W. T. GRANT
COMPANY, BANKRUPT

Statement of Issues Presented

1. Did the District Court err in dismissing plaintiffs' appeal from an order of the Bankruptcy Court where the notice of appeal was not filed until 18 days after entry of the order appealed from and no extension to file such notice pursuant to Bankruptcy Rule 802 (c) had been sought or obtained?
2. Did the District Court err in affirming the Bankruptcy Court's holding that it was without power to grant plaintiffs an extension of time to file a notice of appeal where the request for extension was not made until 41 days following entry of the order appealed from?
3. Did the Bankruptcy Court err in concluding that the failure of plaintiffs to file a timely notice of appeal was due to excusable neglect?
4. Did the District Court err in affirming the Bankruptcy Court's holding that plaintiffs' counsel's letter of August 11, 1976 did not constitute sufficient grounds for seeking rehearing of or relief from the September 14, 1976 order denying plaintiffs' motion for an extension of time to appeal?
5. Did the District Court err in holding that the Bankruptcy Court's finding that the August 11, 1976 letter did not constitute a request for an extension of time to file a notice of appeal was not clearly erroneous?
6. Did the District Court err in holding that the Bankruptcy Court did not abuse its discretion in refusing to vacate and re-enter the July 29, 1976 dismissal order so as to start anew the running of plaintiffs' appeal time?

Statement of the Case

Plaintiffs appeal from the order of the United States District Court, Southern District of New York (Hon. Irving Ben Cooper) entered on December 22, 1976 (A 136-146),* which:

(a) dismissed, as not timely filed, plaintiffs' appeal from an order of the Bankruptcy Court (Hon. John J. Galgay), dated July 26, 1976 and entered July 29, 1976, dismissing the amended complaint herein for failure to state a claim (the "Dismissal Order");

(b) affirmed the Bankruptcy Court's denial of plaintiffs' motion (the "Extension Motion") for a nunc pro tunc extension of time to file a notice of appeal from the Dismissal Order; and

(c) affirmed the Bankruptcy Court's denial of plaintiffs' motion for rehearing and reconsideration of the September 14, 1976 order denying the Extension Motion.

* References bearing the prefix letter "A" are to the Joint Appendix herein. References bearing the prefix letters "SA" are to the Supplemental Joint Appendix.

Statement of Facts

Appellee deems the Statement of Facts contained in plaintiffs' brief to be incomplete and argumentative. Accordingly, the present Statement of Facts will set forth the relevant facts as established before the Bankruptcy Court and the District Court.

The relevant facts upon this appeal consist almost entirely of a chronological sequence of the prior proceedings in the Bankruptcy Court. This sequence of events will be set forth below.

This is a purported class action ostensibly brought on behalf of the former landlords of all of the stores operated by W. T. Grant Company ("Grant"). The action was commenced in January, 1976, while Grant was operating as a debtor-in-possession in Chapter XI proceedings in the Southern District of New York.* Although not directly pertinent to this appeal, the allegations of the amended complaint and the relief sought by plaintiffs therein are summarized in the opinion of the Bankruptcy Court dismissing the complaint (A 23-26). In essence, plaintiffs seek to compel the Trustee to make use and occupation payments for the period of time after Grant (while a Chapter XI debtor) had vacated possession of the store premises but prior

* Grant was adjudicated a bankrupt on April 13, 1976.

to formal rejection or termination of the leases. The Bankruptcy Court held that plaintiffs had failed to state a claim, relying upon a long line of cases from this Court holding that a trustee's (or debtor's) obligation for use and occupation payments ceases when he vacates the leased premises (A 26-29).

As noted, the Dismissal Order was entered on the docket of the Bankruptcy Court on July 29, 1976 (A 48). Notice of the entry of such order was mailed to all counsel on August 2, 1976 (A 101), and was admittedly received by plaintiffs' New York counsel* no later than Thursday, August 5, 1976 (A 16). Plaintiffs' New York counsel also admits that he obtained a copy of the Dismissal Order on August 5, 1976 (A 16).

The 10-day period provided for by Bankruptcy Rule 802(a) for filing a notice of appeal as of right, see p. 11, infra, expired on Monday, August 9, 1976 (were it not for the fact that August 8, 1976 was a Sunday, the time for filing an appeal as of right would have expired at the end of that day). No notice of appeal was filed by plaintiffs by the end of August 9, 1976. Instead, New York counsel for plaintiffs claims he forwarded the order to plaintiffs and/or their California counsel,** supposedly to await further instructions (A 16).

* Plaintiffs have been actively represented throughout this proceeding by New York counsel in addition to California counsel (SA 31).

** It is undisputed that the dominant plaintiff, Paul S. Berger, is also the senior partner of plaintiffs' California attorneys, Berger, Berger, Kahn & Shafton (A 45).

A notice of appeal from the Dismissal Order was not filed until August 16, 1976 -- 18 days after entry of the Dismissal Order (A 52). The notice of appeal was prepared by plaintiffs' California counsel (A 16-17); was dated August 11, 1976 (A 38), two days after the expiration of the ten-day period provided for by Bankruptcy Rule 802(a); and was sent to the Bankruptcy Court with an enclosure letter, the body of which reads as follows:

Please find enclosed for filing,
Plaintiffs-Appellants Notice of Appeal
to District Court.

Kindly file this document and stamp
this letter with your filing date stamp
and return same to the undersigned in the
enclosed, pre-stamped envelope.

Thank you for your cooperation.

(A 105).

The August 16, 1976 Docket Sheet entry of the notice of appeal prepared by the Clerk of the Bankruptcy Court indicates that plaintiffs were notified that the notice of appeal was not timely filed. That entry reads:

8/16/76 Filed notice of appeal by attorneys
for Paul S. Berger, Trustee and
Ronald M. Lee and Sutro Mortgage
Investment Trust, re: order dated
7/26, entered 7/29/76. Notified
of late filing and \$10.00 filing
fee. Sent notice of 806. Copy
sent to attorneys for Bankrupt.

(A 52).

A notification of such late filing by the office of the Clerk of the Bankruptcy Court was endorsed upon a copy of the August 11, 1976 letter which was returned to plaintiffs' California counsel (A 91). Such notification, in pertinent part, set forth as follows:

This is to advise you that your Notice of Appeal has been received by our office. It is appealing an order docketed on 7/29/76, therefore the filing of this appeal is late.

(A 91) (emphasis supplied).

No request for an extension of time to file the notice of appeal beyond the 10-day period provided for by Bankruptcy Rule 802(a) had been made or granted at the time the notice of appeal was filed. Nor had such an extension been requested or granted by the time of the expiration of 30 days after entry of the Dismissal Order -- August 28, 1976 (A 41).

On August 30, 1976 the Trustee moved before the District Court to dismiss plaintiffs' appeal upon the ground that it was not timely filed (SA 1-9). Such motion was subsequently adjourned three times at plaintiffs' request so that it could be heard concurrently with the appeal from the denial of plaintiffs' motions with respect to the extensions of time to appeal from the Dismissal Order.

It was not until September 8, 1976 -- 41 days after the entry of the Dismissal Order and after the Trustee's motion

to dismiss the appeal had been made -- that plaintiffs made a motion pursuant to Bankruptcy Rule 802(c) for an "extension of time" to file their notice of appeal from the Dismissal Order (A 13-38). The motion was based upon what plaintiffs claimed was their "excusable neglect" in admittedly not filing their notice of appeal until 18 days after entry of the order appealed from -- long after the expiration of the ten-day period provided for in Bankruptcy Rule 802(a) (A 16-19). Argument upon the motion was heard on September 14, 1976 (A 64-84). At the conclusion of the hearing, Bankruptcy Judge Galgay denied the motion, holding that while he was "persuaded that there exists excusable neglect," he was without power to extend plaintiffs' time to file their notice of appeal beyond the thirty days (10 + 20) provided for in Bankruptcy Rule 802(c) (A 84-86). Bankruptcy Judge Galgay also directed that his comments on the record be considered as an order (A 85-86).

Thereafter, on September 20, 1976, plaintiffs moved for a rehearing of the order denying their Extension Motion (A 87-107).^{*} The basis of such motion was what plaintiffs claimed were "additional facts and evidence not previously brought to the attention of the Court." (A 89-90) Such claimed new matter turned out to be the August 11, 1976 enclosure letter of plaintiffs'

^{*} Plaintiffs also requested, in the alternative, that Bankruptcy Judge Galgay vacate the July 29, 1976 Dismissal Order and re-enter it in order to start anew the running of time for plaintiffs to appeal therefrom (A 88, 94).

California counsel, quoted above, which accompanied the notice of appeal, which letter plaintiffs claimed was in itself a request for an extension of time to file their notice of appeal within the meaning of Bankruptcy Rule 802(c) (A 91). By opinion and order dated October 1, 1976, Bankruptcy Judge Galgay denied the motion in all respects, holding first, that the August 11, 1976 letter was fully known to plaintiffs at the time of the original Extension Motion and thus did not warrant relief under either Rule 59 or Rule 60(b)(2) of the Federal Rules of Civil Procedure, and second, that in any event, "no interpretation" of the August 11, 1976 letter could permit it to be construed as a request for an extension (A 132-135).

Plaintiffs' appeals from Bankruptcy Judge Galgay's orders of September 14, 1976 and October 1, 1976 with respect to plaintiffs' request for an "extension" to file their appeal were heard together with the Trustee's motion to the District Court to dismiss the appeal as not timely filed. As noted above, the District Court granted the Trustee's motion to dismiss the appeal and affirmed the orders of the Bankruptcy Court (A 136-146).^{*} This appeal followed (A 147-148).

^{*} In view of its holding that no timely request for an extension to file a notice of appeal had been made, the District Court found it unnecessary to review Bankruptcy Judge Galgay's conclusion, which the Trustee maintains was erroneous, that plaintiffs' failure to file their notice of appeal within the 10-day period allowed by Bankruptcy Rule 802(a) was due to "excusable neglect" (A 143). See Point III, infra.

Summary of Argument

In granting the trustee's motion to dismiss plaintiffs' appeal from the Dismissal Order and in affirming the Bankruptcy Judge, the District Court rejected each of the arguments raised by plaintiffs. Thus, with respect to the arguments which plaintiffs continue to press on the instant appeal, the District Court held:

(a) that the appeal was required to be dismissed, since the filing of the notice of appeal on August 16, 1976 -- 18 days after the entry of the Dismissal Order -- was not timely, nor was any extension to file such notice granted in accordance with the requirements of Bankruptcy Rule 802(c) (A 138-141);

(b) that assuming "excusable neglect", plaintiffs' request for an extension was untimely, since it was not made within the 30-day period following the entry of the Dismissal Order (A 139-142);

(c) that plaintiffs' counsel's letter to the Bankruptcy Court dated August 11, 1976 was not tantamount to a request for an extension of time to file a notice of appeal within the meaning of Bankruptcy Rule 802 (c) and the Bankruptcy Court's determination to that effect was not clearly erroneous (A 142);

(d) that the nunc pro tunc extension of time to appeal sought by plaintiffs by the expedient of vacating the July 29, 1976 Dismissal Order and then reinstating it at a later date so that the time to file a notice of appeal would run anew was unwarranted (A 143-144); and

(e) that the August 11, 1976 letter from plaintiffs' counsel did not constitute such "additional facts and evidence not previously brought to the attention" of the Bankruptcy Court so as to warrant relief under either Rule 59 or 60(b)(2) of the Federal Rules of Civil Procedure from either the Dismissal Order or the September 14, 1976 order of the Bankruptcy Court denying plaintiffs' requests for a retroactive extension of time to file their notice of appeal (A 144-145).

As will be demonstrated below, these conclusions of the District Court were eminently correct. Moreover, although the District Court found it unnecessary to reach the issue (A 143), the Trustee will demonstrate that it was erroneous for the Bankruptcy Court to conclude that plaintiffs' failure to file their notice of appeal within the 10-day period allowed by Bankruptcy Rule 802(a) was due to "excusable neglect".

Argument

POINT I

THE NOTICE OF APPEAL FROM THE
DISMISSAL ORDER WAS NOT TIMELY
FILED AND THE APPEAL THEREFROM
WAS PROPERLY DISMISSED.

Appeals to the district court from judgments and orders of bankruptcy judges (formerly known as "referees") are governed by Part VIII of the Rules of Bankruptcy Procedure (hereinafter "Bankruptcy Rules") enacted by the United States Supreme Court by order dated April 24, 1973, effective October 1, 1973.

Bankruptcy Rule 801(a)* provides in pertinent part that:

(a) Manner of Taking Appeal. An appeal from a judgment or order of a referee to a district court shall be taken by filing a notice of appeal with the referee within the time allowed by Rule 802 * * * .

(Emphasis supplied.)

Rule 802 provides in pertinent part:

TIME FOR FILING NOTICE OF APPEAL

(a) Ten-Day Period. The notice of appeal shall be filed with the referee within 10 days of the date of the entry of the judgment or order appealed from. * * *

* * *

(c) Extension of Time for Appeal. The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property.

Rule 803 provides that:

Unless a notice of appeal is filed as prescribed by Rules 801 and 802, the judgment or order of the referee shall become final.

* Bankruptcy Rule 801(a) is the designation given as of August 1, 1976 to what was previously designated as Bankruptcy Rule 801. The change was necessitated by the addition of a new paragraph -- Rule 801(b) -- dealing with the voluntary dismissal of appeals.

When Bankruptcy Rules 801(a), 802 and 803 are read together, it can be seen that, as relevant here, a bankruptcy judge's order or judgment becomes final at the expiration of 10 days from the date of the entry of such order or judgment, unless a notice of appeal has been filed within such 10-day period or unless an extension of time for filing such notice of appeal has been obtained from the bankruptcy judge pursuant to Bankruptcy Rule 802(c). The maximum permissible extension under Rule 802(c) is 20 days after the expiration of the initial 10-day period, and if the request is made after the initial 10-day period has elapsed, it cannot be granted unless the requester has made a showing of excusable neglect. The date of "entry" of the order appealed from is the date upon which the notation of the order or judgment was made upon the bankruptcy court's docket. See In re Great Western Ranches, Inc., 511 F.2d 1021, 1023 (9th Cir. 1975).

The law is clear that the 10-day period must be "strictly construed and compulsorily applied." In re Great Western Ranches, Inc., *supra*, at 1024. See also, *e.g.*, In re General Insecticide Co., 403 F.2d 629, 630-31 (2d Cir. 1968); In re Credit Industrial Corp., 366 F.2d 402, 407 (2d Cir. 1966); In re Imperial "400" National, Inc., 391 F.2d 163, 168-69 (3d Cir. 1968); St. Regis Paper Co. v. Jackson, 369 F.2d 136, 140-42 (5th Cir. 1966); In re Enyart, 509 F.2d 1058,

1060-61 (6th Cir. 1975); In re Acme Furnace Fitting Co., 302 F.2d 318, 320 (7th Cir.), cert. denied, 371 U.S. 853 (1962); Goff v. Pfau, 418 F.2d 649, 652-54 (8th Cir. 1969), cert. denied, 398 U.S. 931 (1970); In re Abilene Flour Mills Co., 439 F.2d 937, 939 (10th Cir. 1971). Although these cases were decided under Section 39c of the Bankruptcy Act, as amended in 1960, Bankruptcy Rule 803 makes no change in the effect of finality required to be given to an order or judgment after the expiration of the time to appeal therefrom. As set forth in the Advisory Committee's Note to Rule 803:

This rule preserves the finality of a referee's order on the expiration of the period allowed for seeking review, as now provided in § 39c of the Act.

See also In re St. Cloud Tool & Die Co., 533 F.2d 387, 390 (8th Cir. 1976); In re May Lee Industries, Inc., 402 F.Supp. 409, 412 (S.D.N.Y. 1975).

In the present case, the notice of appeal from the Dismissal Order was not filed until August 16, 1976 -- eighteen days after the order appealed from was entered. Such filing was far beyond the ten-day period prescribed by Bankruptcy Rule 802(a) and was thus untimely. Moreover, no extension of time for filing the notice of appeal -- as provided for by Bankruptcy Rule 802(c) -- was applied for or granted. See Point II, infra. Since late

filing is a jurisdictional defect which deprived the District Court of the power to review the order appealed from, the appeal was properly dismissed. See In re Butts, 123 F.2d 250, 251 (2d Cir. 1941); Roberts v. Bank of America, 198 F.2d 919 (9th Cir. 1952); In re Country Club Building Corp., 128 F.2d 36 (7th Cir. 1942); In re Markman, 41 F.Supp. 95 (S.D.N.Y. 1941); In re May Lee Industries, Inc., supra.

POINT II

THE BANKRUPTCY JUDGE WAS WITHOUT POWER TO GRANT PLAINTIFFS AN EXTENSION TO FILE A NOTICE OF APPEAL WHERE THE REQUEST FOR EXTENSION WAS NOT MADE UNTIL 41 DAYS FOLLOWING ENTRY OF THE ORDER APPEALED FROM.

Both the Bankruptcy Court and the District Court held that an extension of time pursuant to Rule 802(c) may not be granted if requested after expiration of both the initial 10-day period to file a notice of appeal as of right and the additional 20-day period in which the bankruptcy judge is authorized by Rule 802(c) to extend the time for filing upon a showing of excusable neglect, where the notice of appeal was "filed" as a late filing after the expiration of the initial 10-day period and before the expiration of the additional 20-day period but without any prior extension of time to do so or any attempted showing of excusable neglect.

It is submitted that the courts below were correct in holding that no such "nunc pro tunc" extension of time may be granted. The language of Bankruptcy Rule 802(c), quoted above, the Advisory Committee's Note and the comments with respect to such Rule make clear that no extension of time to file a notice of appeal may be granted unless the request therefor is made within 30 days after entry of the order appealed from. Thus, the intention of the drafters of Rule 802(c) is set forth by the following pertinent portions of the Advisory Committee's Note:

[T]his rule, in subdivision (c), places an outer limit of 20 days on any extension. If no motion of the kind contemplated in subdivision (b) and no request for an extension in accordance with subdivision (c) is filed, the time for appeal from a referee's judgment or order expires 10 days after its entry, and it becomes final as provided in Rule 803. Rule 906(b), like Rule 26(b) of the Federal Rules of Appellate Procedure, prohibits the enlargement of the time for filing a notice of appeal.

* * *

A request for an extension of the time for filing a notice of appeal from a referee's judgment or order not authorizing the sale of property may be filed after the expiration of the 10-day period following its entry or the entry of an order disposing of a motion as provided in subdivision (b), but the extension may be granted on such a request only on a showing that the delay was due to excusable neglect. Moreover, any allowable extension cannot exceed the 20-day limitation prescribed by the

first sentence of subdivision (c). Thus the maximum time allowable under this rule for filing an appeal is 30 days after the entry of the judgment or order appealed from or 30 days from the entry of an order disposing of a motion that terminates the running of the time for filing an appeal as provided in subdivision (b).

The Comment following Bankruptcy Rule 802(c) in the 1976 Collier Pamphlet Edition of the Bankruptcy Act and Rules (Part 2) focuses even more sharply on the issue presented here:

Rule 802 supersedes the provisions of § 39c of the Act which (1) specify the time during which an appeal may be taken; (2) authorize the court to extend the time for appeal upon petition and cause shown made within the original time for appeal; (3) require that an order of the referee become final in all circumstances if no notice of appeal is filed within the original 10 day period or extension thereof. On this last point, note particularly that under Subdivision (c) the referee may entertain a request for an extension of time made within 20 days after the initial 10 day period has expired. Such a request must be accompanied by a showing of excusable neglect and may not be made if the order sought to be appealed authorizes the sale of property.

(Emphasis supplied.)

By necessary implication, if the request for an extension is not made within 20 days after the initial 10-day period has expired, a request for extension may not be entertained.

The foregoing conclusion is pointedly spelled out in 13 Collier, Bankruptcy ¶ 802.07[6] (14th ed. 1976):

So the last sentence of subdivision (c) should be construed as if it read:

" . . . A request to extend the time for filing a notice of appeal must be made before the expiration of the time prescribed by subdivisions (a) and (b) of this rule [10 days], except that a request made within 20 days after the expiration of such time may be granted for a period not exceeding the remaining portion of said 20 day period upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property. After the expiration of such 20 day period, no extension shall be granted under any circumstances."

If it were so written, it would then be abundantly plain to any party who had slept for 31 days that his relief, if any, must come from some source other than Rule 802(c) * * *.

(Emphasis supplied.)

The above-stated principles were applied by the court in the appeal in In re Polled Exotics Limited Partnership, [1975-1976] CCH Bankr. L. Rep. ¶ 65,883 (W.D. Va. January 24, 1976). There, as in the present case, a notice of appeal was filed more than ten days after the entry of judgment and the appellant was notified of the late filing, but

made no request to extend the time for appeal within the subsequent 20-day period. The order of the bankruptcy judge was declared final and the appeal therefrom dismissed as untimely.

The strict application of the rules governing the timely filing of notices of appeal was also recently illustrated in In re Butler's Tire & Battery Co., 8 Collier Bankr. Cases 790 (D. Ore. May 11, 1976). In that case, appellant-creditor moved for an extension of time to file its appeal on the 20th day following entry of the order appealed from. The extension motion was granted by the Bankruptcy Court on the 41st day following entry of the order and the appellant filed its notice of appeal on that day. The trustee cross-appealed from the decision allowing the extension. The district court reluctantly held that since the notice of appeal was not timely filed under Rule 802(c), it lacked jurisdiction and was required to dismiss the appeal. The court reiterated the principle that:

Failure to comply strictly with the terms of the rule [802] is fatal to [the district court's] jurisdiction over this appeal, regardless of the reason for the delay.

8 Collier Bankr. Cases at 792.

Plaintiffs seek to extricate themselves from the impact of the foregoing rules and authorities, by pointing

to the fact that a notice of appeal was in fact filed by them on August 16, 1976 -- 18 days after entry of the order appealed from (see Plaintiffs' Brief, Point I). This contention must fail, since the "filing" of such notice of appeal on August 16, 1976 was ineffective to create any rights in plaintiffs. Thus, as set forth above, Bankruptcy Rule 803 expressly provides that:

Unless a notice of appeal is filed
as prescribed by Rules 801 and 802, the
judgment or order of the referee shall
become final.

(Emphasis supplied.)

And, Bankruptcy Rule 906(b) expressly forbids the enlargement of the time for filing an appeal except to the extent and under the conditions stated in Rule 802. In the present case, the notice of appeal was not filed "as prescribed by Rules 801 and 802." Concededly the notice was not filed as of right within the 10-day period provided for by Rule 801(a). Similarly, and crucially, the notice filed on the 18th day after entry of the Dismissal Order could be properly filed only pursuant to Rule 802(c), but as expressly provided in that Rule, such notice could only be filed following a request for leave of court "granted upon a showing of excusable neglect." No leave of court upon a showing of excusable neglect was obtained or even requested prior to the filing of plaintiffs' notice of appeal. The notice of appeal was thus a nullity.

Since no notice of appeal was filed "as prescribed by Rules 801 and 802" within 30 days after entry of the Dismissal Order, by the terms of Rule 803 such order became final and could not thereafter be appealed. Accordingly, after the Dismissal Order became final, the Bankruptcy Judge had no power to validate the invalid notice of appeal or otherwise extend plaintiffs' right to appeal, and the Bankruptcy Judge and the District Court correctly so held.

Furthermore, without regard to the strict technical time requirements of the Bankruptcy Rules, sound policy reasons mandate affirmance of the result reached below. Thus, if plaintiffs' position were to prevail, it would mean that a party could easily avoid the bar of a final judgment or order by simply filing, without leave of court, a late notice of appeal before the expiration of 30 days after entry of the order appealed from, bide his time for an indeterminate time after the expiration of such 30 days and then move for an "extension", retroactive to the late filing date. The constant uncertainty which thereby would be created makes it unthinkable that the relief sought by plaintiffs is or could be authorized. Such a result would undermine the policy of finality embodied into Bankruptcy Rule 803. See Advisory Committee's Note following Rule 803.

POINT III

THE BANKRUPTCY JUDGE ERRED IN CONCLUDING THAT THE FAILURE OF PLAINTIFFS TO FILE A NOTICE OF APPEAL WITHIN THE 10-DAY PERIOD ALLOWED BY BANKRUPTCY RULE 802(a) WAS DUE TO EXCUSABLE NEGLECT WITHIN THE MEANING OF RULE 802(c) OF THE BANKRUPTCY RULES.

In view of the Bankruptcy Judge's holding that he was not authorized to grant plaintiffs' untimely motion for a retroactive extension of their time to file their appeal, it was not necessary for him to determine the issue of whether the plaintiffs had made the requisite showing of "excusable neglect" in not filing their notice of appeal on time to justify the grant of an extension pursuant to Bankruptcy Rule 802(c). Nonetheless, in his oral opinion following argument of the motion, the Bankruptcy Judge stated, by way of dictum, that:

I am persuaded that there exists excusable neglect, probably the fault of the Postal Service, possibly the crush of business in my own Clerk's office.

I am not persuaded that the Counsel was bound to use telephone communication with his West Coast Counsel, although it probably would have saved all the problem had it been done.

(A 84-85).

As noted above, the District Court found it unnecessary to reach this issue (A 143). It is submitted that this conclusion

by the Bankruptcy Judge was erroneous and that plaintiffs' failure to make the requisite showing of "excusable neglect" under Rule 802(c) for their failure to file their notice of appeal within the 10-day period allowed by Bankruptcy Rule 802(a) is an additional ground upon which the denial of their "Extension Motion" could have been based.

Plaintiffs' attempted showing of "excusable neglect" consisted of their claim that New York counsel for plaintiffs did not receive notice of the Dismissal Order until August 5, 1976; that he obtained a copy of that order (which was also an opinion) on that date and forwarded it to plaintiffs (and presumably plaintiffs' California attorneys, the senior partner of which is the lead plaintiff here) "for information and a determination by them as to whether and what further proceedings should be taken"; that New York counsel's letter was not received until August 9, 1976 by California counsel who thereupon, on August 11, 1976 -- two days after expiration of the 10-day period under Rule 802(a) -- mailed the notice of appeal to the Bankruptcy Court with a letter requesting that the notice of appeal be filed (A 16-17).

It can readily be seen that this is not a situation in which an appellant was not notified of the entry of the order appealed from until after expiration of the time to

appeal. Such hypothetical lack of notice would in all likelihood justify a finding of excusable neglect. See In re Temperature Control, Inc., 7 Collier Bankr. Cases 735 (N.D. Ga. Jan. 13, 1976). See also Bankruptcy Rule 922, last sentence. However, in the present case plaintiffs admit that the notice from the Bankruptcy Court of the entry of the order appealed from was received by their New York counsel no later than August 5, 1976 and a copy of the opinion and order obtained on that day (A 16). Since the ten-day period for filing a notice of appeal did not expire until the end of August 9, 1976 (August 8, 1976, the tenth calendar day after the July 29, 1976 entry date, was a Sunday), there can be no legitimate reason why counsel could not easily have filed a one-page notice of appeal prior to the end of August 9, 1976. By plaintiffs' own admission, they had three full business days (August 5, August 6 and August 9) plus an intervening weekend to accomplish such simple task.

Thus, plaintiffs knew of the Dismissal Order in ample time to file a timely notice of appeal. Under such circumstances, the failure to file a timely notice of appeal cannot properly be attributed to "excusable neglect". See, e.g., In re Reiser, [1975-1976] CCH Bankr. L. Rep. ¶ 66,203 (W.D. Wis. Dec. 2, 1976); In re Fetherston, [1975-1976] CCH Bankr. L. Rep. ¶ 65,871 (W.D. Wis. Jan. 5, 1976). Cf. United

States v. Buckley, 382 F.2d 611, 615 (10th Cir. 1967), cert. denied, 390 U.S. 99 (1968). Thus, in the Reiser case, an extension under Bankruptcy Rule 802 was sought on the 15th day after entry of the order sought to be appealed from, based upon the representation of the creditor's attorney that he did not timely file the notice because he did not receive a copy of the order until six days after it had been entered and was waiting to talk to the creditor (which he assumed had received the opinion) to discuss the taking of an appeal. The Bankruptcy Judge held that these facts did not present a basis for a finding of excusable neglect.

The "excuse" in the present case is strikingly similar to that rejected in the Reiser case. The "excuse" given by plaintiffs' New York counsel -- that he sent the opinion and order to plaintiffs to await a determination by them as to further proceedings -- if credible at all, should not excuse the late filing. As noted above, the dominant plaintiff in this purported class action happens to be the senior partner of plaintiffs' California attorneys. A telephone call from New York counsel to such California attorneys on August 5, 1976 -- four days prior to the expiration of the 10-day period to file without leave of court -- would no doubt have elicited the necessary instructions to proceed forthwith with the filing of a notice of appeal.

In sum, it is submitted that not only did the Bankruptcy Judge lack the power to grant plaintiffs' untimely request to extend their time to appeal, as the Bankruptcy Judge held (see Point II, supra), but also that the excuses advanced by plaintiffs did not amount to "excusable neglect" within the meaning of Bankruptcy Rule 802(c). Accordingly, either of such grounds would justify denial of plaintiffs' nunc pro tunc Extension Motion.

POINT IV

THE BANKRUPTCY JUDGE'S FINDING THAT THE AUGUST 11, 1976 LETTER FROM PLAINTIFFS' COUNSEL DID NOT CONSTITUTE A REQUEST FOR AN EXTENSION TO FILE A NOTICE OF APPEAL WAS NOT CLEARLY ERRONEOUS. SUCH LETTER, AS A MATTER OF LAW, COULD NOT HAVE BEEN A SUFFICIENT REQUEST FOR AN EXTENSION UNDER BANKRUPTCY RULE 802(c). THE FILING OF THE NOTICE OF APPEAL AS A "LATE FILING" BY THE BANKRUPTCY CLERK DID NOT AND COULD NOT AMOUNT TO THE GRANT BY THE BANKRUPTCY JUDGE OF AN EXTENSION TO FILE THE NOTICE OF APPEAL.

In a last-ditch attempt to salvage their appeal from the Dismissal Order, plaintiffs made the highly strained contention on their motion for reconsideration and rehearing of their Extension Motion that counsel's August 11, 1976 letter, quoted above, p. 5, was in reality a "request to extend the time for filing a notice of appeal" and thus timely under Rule

802(c) (A 91-93). The Bankruptcy Judge considered this claim on the merits and found that "no interpretation of California counsel's letter would permit the reader to conclude that plaintiff was requesting an extension." (A 135). The District Court agreed (A 142). Here again, the courts below were unquestionably correct.

A word-by-word examination of the letter reveals that the only "request" therein is a request to file the notice of appeal, to stamp the letter and to return it to plaintiffs' counsel. There is not one word in the letter requesting any extension of time. Indeed, a request for extension could not even have been plaintiffs' counsel's secret unexpressed intention in writing such letter. Thus, in plaintiffs' counsel's affidavit to the District Court submitted in opposition to the Trustee's motion to dismiss the appeal, plaintiffs' counsel claimed that he was not even aware that the 10-day period had expired when he mailed the notice of appeal which accompanied the letter (SA 19).

The finding of fact by the Bankruptcy Court that the August 11, 1976 letter was not a request for an extension may be set aside only if "clearly erroneous." Bankruptcy Rule 810. The District Court explicitly held that such finding was not "clearly erroneous" (A 142). It is submitted

that not only is such finding not "clearly erroneous," but that no contrary interpretation of the letter is even possible.

The finding by the Bankruptcy Judge may also be sustained as a matter of law. Thus, Rule 802(c) provides that a request for an extension of time to file a notice of appeal made after expiration of the 10-day period provided for by Rule 802(a) may be granted only upon a showing of "excusable neglect." Since the letter in question was admittedly not sent until after the expiration of the 10-day period, a showing of excusable neglect for not filing within that time was required. Even if, by some stroke of judicial magic, plaintiffs' counsel's August 11, 1976 letter could be transformed into a "request" for an extension, by no stretch of the imagination could it be even claimed that such letter contains or was accompanied by a showing of excusable neglect or even an attempt to make such a showing. Thus, the letter cannot be held to satisfy Rule 802(c).

Plaintiffs, in their desperation, seek to convert the fact that the notice of appeal was docketed by the Clerk of the Bankruptcy Court, albeit with a notation that it was filed late, into "proof" that their "request" for an extension

of time had been granted by the Bankruptcy Judge. See Plaintiffs' Brief, Point III. Plaintiffs blithely make such argument despite the fact that the Bankruptcy Court explicitly held that the August 11, 1976 letter was not a request for an extension (A 135). It is difficult to fathom how a request for an extension could have been granted if no such request was even made.

Moreover, the basic premise of this "argument" -- that because the August 11, 1976 letter was addressed to the Bankruptcy Judge himself, the filing of the notice of appeal, albeit as a "late filing", was pursuant to the personal direction of the Bankruptcy Judge himself (Plaintiffs' Brief, p. 15. See also Id. at 12-13.) -- is without foundation. There is nothing in the record which would indicate that the Bankruptcy Judge himself even saw counsel's August 11, 1976 letter before the reargument motion, much less that the Bankruptcy Judge himself directed that the notice of appeal be filed. The "filing" of such notice appears not to be the result of the exercise of any judicial power, but rather, simply the exercise of a routine, ministerial function by the office of the Bankruptcy Clerk. Thus, the letter in fact was returned to plaintiffs' counsel by the Bankruptcy Clerk's office, with the notation thereon that "* * * your notice of appeal has been received by our office" (A 105) (emphasis

supplied). Moreover, such notification, far from giving plaintiffs' counsel any assurance that an extension motion had been granted, went on to advise plaintiffs' counsel that the notice "is appealing an order docketed on 7/29/76, therefore the filing of this appeal is late" (A 105) (emphasis supplied). Thus, the record establishes that, contrary to plaintiffs' contention, the Bankruptcy Judge himself did not act upon counsel's August 11, 1976 letter or any request for an extension (see A 118) and that the filing by the clerk of the late notice of appeal cannot be construed to be a grant by the Bankruptcy Judge of a request to extend the time for filing that very notice of appeal.

Finally, assuming, arguendo, that the late filing of the notice of appeal could somehow be construed as the granting by the Bankruptcy Judge of a request for an extension, such hypothetical exercise of judicial power would be invalid, since, as shown above, Rule 802(c) provides that no extension may be granted except "upon a showing of excusable neglect." Since it cannot be disputed that no such showing of excusable neglect was made at the time the notice of appeal was filed, as a matter of law such filing cannot be construed as a grant by the Bankruptcy Judge of a valid extension of time to file the notice of appeal from the Dismissal Order.

POINT V

PLAINTIFFS' COUNSEL'S LETTER OF AUGUST 11, 1976 DID NOT CONSTITUTE SUFFICIENT GROUNDS FOR SEEKING RECONSIDERATION OR REHEARING OF THE SEPTEMBER 14, 1976 ORDER DENYING PLAINTIFFS' MOTION FOR AN EXTENSION OF THEIR TIME TO APPEAL. IN ANY EVENT, THE BANKRUPTCY JUDGE IN EFFECT GRANTED PLAINTIFFS' MOTION FOR REHEARING AND UPON REHEARING REJECTED THE SUPPOSED "NEWLY DISCOVERED EVIDENCE" PRESENTED BY PLAINTIFFS.

As set forth above, on September 20, 1976 plaintiffs moved for a rehearing of the September 14, 1976 order denying their September 8, 1976 Extension Motion (A 87-88). Such rehearing motion was by its terms made pursuant to Rules 59 and 60(b) of the Federal Rules of Civil Procedure, based upon what plaintiffs claimed were "additional facts and evidence not previously brought to the attention of this Court but of which the Court should be aware." (A 89-90) Such claimed new matter turned out to be the August 11, 1976 enclosure letter of plaintiffs' California counsel, which accompanied the late notice of appeal and which plaintiffs claimed was in itself a timely request for an extension of time to file a notice of appeal (A 91-93).

In his decision denying plaintiffs' September 20, 1976 motion, the Bankruptcy Judge stated that:

there is substantial doubt as to whether the letter of August 11th is newly discovered evidence of the type which would warrant relief under either Rule 59 or Rule 60(b)(2) of the Federal Rules of Civil Procedure.

(A 134).

In so holding, the Bankruptcy Judge observed:

It is hard to imagine how counsel's own letter was not discoverable when the original motion for an extension was made. * * * [T]he motion for rehearing and reconsideration merely represents an attempt by plaintiffs to introduce a new theory by which their notice of appeal could be considered filed in a timely manner.

(A 135).

The District Court agreed with the Bankruptcy Judge in all respects (A 144-145).

It requires little discussion to demonstrate that the courts below were correct. Thus, as set forth in 7 Moore's Federal Practice, ¶ 60.23[4]:

The principles already discussed in connection with Rule 59 are, therefore, generally applicable here. And hence for relief to be granted under Rule 60(b)(2), the failure to produce the evidence at the trial must not have been caused by the moving party's lack of due diligence. The evidence

must be such as was not and could not
by the exercise of diligence have been
discovered in time to present in the
original proceeding. * * *

(Emphasis supplied.)

See also 6A Moore's Federal Practice, ¶ 59.08[3]; 11 Wright & Miller, Federal Practice And Procedure, § 2859 and cases cited therein. Thus, plaintiffs failed to make a showing sufficient to entitle them to reconsideration or rehearing of the September 14, 1976 order denying their Extension Motion.

In any event, plaintiffs may not complain that the Bankruptcy Court did not consider their "newly discovered evidence", since after observing that neither Rule 59 nor Rule 60(b) was satisfied, the Bankruptcy Court nonetheless went on to consider -- and reject -- such supposed "newly discovered evidence" as a sufficient basis upon which to change his prior decision denying plaintiffs' Extension Motion (A 135). See Point IV, supra. Thus, in effect, the Bankruptcy Court granted plaintiffs' motion for a rehearing or relief from the denial of the Extension Motion and, upon such rehearing and motion for relief, adhered to its original decision.

POINT VI

THE BANKRUPTCY COURT DID NOT ABUSE
ITS DISCRETION IN REFUSING TO VACATE
AND RE-ENTER THE JULY 29, 1976 DIS-
MISSAL ORDER SO AS TO START ANEW THE
RUNNING OF PLAINTIFFS' APPEAL TIME.

Plaintiffs' present principal contention would now appear to be that, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, the Bankruptcy Court, in the exercise of its discretion, should have vacated the July 29, 1976 Dismissal Order and re-entered it at a later date so as to permit plaintiffs to file a timely notice of appeal. See Plaintiffs' Brief, pp. 6-10, 16-22. This argument is without merit.

Preliminarily, it should be pointed out that plaintiffs' Rule 60(b)(6) argument was merely an alternative argument advanced by plaintiffs for the first time upon plaintiffs' motion for rehearing of its Extension Motion which had previously been denied by the September 14, 1976 order. By the very terms of their motion, plaintiffs asked that their Rule 60(b)(6) claim be considered only in the event the Bankruptcy Court denied the rehearing motion for lack of jurisdiction. Thus, in his moving affidavit upon such rehearing motion, plaintiffs' counsel made the following request (A 93-94):

[I]f this Court finds that the filing of the Notice of Appeal precludes it from acting on the application [for an extension] hereinabove discussed, request is made in the interest of justice;

* * *

(b) that this Court vacate its Order dated July 29, 1976 and make a new order dated currently in order to permit plaintiffs to file a new notice of appeal within a ten day period.

As can be seen, such prayer was predicated upon plaintiffs' fear that the Bankruptcy Court would rule that it had no jurisdiction to hear the Extension Motion by reason of the fact that a notice of appeal (albeit late) had been filed with the District Court. Despite plaintiffs' claims to the contrary (Plaintiffs' Brief, p. 13, fn. 4), it is clear from the Bankruptcy Court's opinion (A 132-135) that the Bankruptcy Court did not base its denial of the Extension Motion upon the existence of an appeal before the District Court, but instead, considered (and rejected) plaintiffs' Extension Motion on the merits. Thus, plaintiffs' alternative Rule 60(b)(6) prayer was, by the terms of plaintiffs' own motion, not before the Bankruptcy Court for consideration. Accordingly, plaintiffs should not be allowed to raise that issue upon this appeal.*

In any event, the law is clear that except under the most extraordinary circumstances, motions under Rule 60(b) may not

be used to circumvent time requirements
by the simple expedient of vacating a

* The Bankruptcy Court did consider the Rule 60(b)(6) claim (A 132) but denied such relief without discussion (A 135). The claim was explicitly considered and rejected by the District Court (A 143-144).

judgment and reinstating it in order to start anew the running of the appeal period.

Hodgson v. United Mine Workers,
473 F.2d 118, 124 (D.C. Cir. 1972).

See also In re Morrow, 502 F.2d 520 (5th Cir. 1974). Extraordinary circumstances justifying such relief were held to be present in Expeditions Unlimited Aquatic Ent., Inc. v. Smithsonian Inst., 500 F.2d 808 (D.C. Cir. 1974), upon which plaintiffs relied below. The holding in that case, wherein neither side learned of entry of the judgment until some 10 months after entry and the winning side did not oppose the motion, was limited to the extraordinary facts present therein. 500 F.2d at 809, 810. The District of Columbia Circuit, however, distinguished the situation before it from previous cases in which it had denied such relief, such as where, as in the present case, the failure of the out-of-state counsel to timely learn of the entry of judgment was due to negligence of local counsel, see Lord v. Helmandollar, 348 F.2d 780 (D.C. Cir. 1965), cert. denied, 383 U.S. 928 (1966), or where, as here, counsel learned of the entry within ample time to seek an extension, see Hodgson v. United Mine Workers, supra. As will be shown, the circumstances presented here do not even begin to come close to an extreme situation such as was presented in Expeditions.

Thus, as shown above, Point III, supra, plaintiffs' failure to file their notice of appeal within the initial ten-day period permitted under Bankruptcy Rule 802(a) was at best the result of inexcusable neglect by or lack of coordination between plaintiffs' local counsel and plaintiffs' California counsel. Thereafter, this neglect was compounded by plaintiffs' failure to attempt to preserve their appeal rights after notification by the Clerk of the Bankruptcy Court that their notice of appeal was untimely. As shown, on August 16, 1976, plaintiffs were notified that "the filing of this appeal is late". Plaintiffs then had a full two weeks (to and including August 30, 1976) within which to make a timely request to extend their time to appeal, but failed to do so. Cf. In re Polled Exotics Limited Partnership, [1975-1976] CCH Bankr. L. Rep. ¶ 65,883 (W.D. Va. January 24, 1976).

Ironically, plaintiffs now seek to convert their counsel's failure to react to such notice of late filing into an "excuse" for not making a timely request for an extension. See Plaintiffs' Brief, pp. 9, 17-18, 20-21. Thus, plaintiffs claim that they were "lulled into security and inactivity on the assumption that their notice of appeal had been properly filed by or at the direction of Judge Galgay . . ." (Plaintiffs'

Brief, p. 21). However, it is submitted that this "excuse" just will not wash. When plaintiffs' counsel was notified by the Clerk that "the filing of this appeal is late" (A 105), counsel should have been galvanized into making a motion to extend plaintiffs' time to appeal. Construed in the light most favorable to plaintiffs, counsel's conduct amounts to a manifestation of unfamiliarity by counsel with the applicable rules and procedures governing appeals in bankruptcy cases. Such unfamiliarity on the part of counsel does not even support a finding of excusable neglect, see In re Fetherston, supra; United States v. Buckley, supra, much less the extraordinary circumstances required to warrant relief under FRCP 60(b)(6).

Relief under FRCP 60(b) is discretionary and appellate review of a determination of a motion thereunder is limited to determining whether the court below abused its discretion. 11 Wright & Miller, Federal Practice And Procedure, § 2857. Under the circumstances presented here, the Bankruptcy Court's refusal to vacate the Dismissal Order so as to permit its re-entry in order to start anew plaintiffs' time to appeal was not an abuse of discretion, even assuming, arguendo, that the Bankruptcy Court had the power to grant such relief.

Furthermore, under the circumstances presented here, the grant of the Rule 60(b)(6) relief sought by plaintiffs would contravene the policy of finality inherent in Bankruptcy Rules 802 and 803. As demonstrated above, plaintiffs belatedly sought relief under Bankruptcy Rule 802(c), but such relief was properly refused. By making their Rule 60(b)(6) motion, plaintiffs in effect are seeking to show "excusable neglect" for their failure to comply with the requirements of Rule 802. Quite apart from the lack of merit to such contention, see pp. 36-37, supra, under the circumstances presented here, such relief would, as the District Court pointed out (A 143), undermine the intent of Rule 802(c) and its predecessor, Section 39c of the Bankruptcy Act, to promote finality and limit the exercise by the courts of discretionary power to grant extensions of time for appeal after the expiration of the original appeal time. Cf. 13 Collier, Bankruptcy ¶ 802.03 (14th ed. 1976). See also Bankruptcy Rule 803 and Advisory Committee's Note thereto.

Plaintiffs are not entitled to relief under FRCP 60(b)(6) for yet another reason. The thrust of plaintiffs' argument is that they were unable to comply with the requirements of Bankruptcy Rule 802 because of what they contend was misunderstanding and excusable neglect in their dealings and correspondence with the Bankruptcy Court. See Plaintiffs' Brief, pp. 7-9, 12, 17-18, 20-21. It would thus appear that

if any relief under Rule 60(b) is available to plaintiffs it should have been sought under subdivision (1) of Rule 60(b), which specifically covers "mistake, inadvertence, surprise, or excusable neglect". This being so, plaintiffs may not seek relief under the catch-all provisions of Rule 60(b)(6), for in this Circuit:

Rules 60(b)(1) and 60(b)(6) are mutually exclusive, so that any conduct which generally falls under the former cannot stand as a ground for relief under the latter.

United States v. Erdoss,
440 F.2d 1221, 1223 (2d Cir.),
cert. denied, 404 U.S. 849 (1971).

See also Rinieri v. News Syndicate Co., 385 F.2d 818, 822 (2d Cir. 1967); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir.), cert. denied, 409 U.S. 883 (1972).

Since, as demonstrated above, plaintiffs have failed to establish excusable neglect of any kind, much less the kind contemplated under Rule 60(b)(1), see, e.g., United States v. Erdoss, supra, plaintiffs are not entitled to any relief under Rule 60(b), subdivisions (1) or (6).

Conclusion

The order of the District Court must be affirmed
in all respects.

Respectfully submitted,

WACHTELL, LIPTON, ROSEN & KATZ
Special Counsel to Defendant-
Appellee Charles G. Rodman,
Trustee of the Estate of W. T.
Grant Company, Bankrupt
299 Park Avenue
New York, New York 10017
Tel. (212) 371-9200

Theodore Gewertz
Of Counsel.

April 21, 1977.

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